Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-36-91
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND PEH SWEE CHIN SCJJ
2 DECEMBER 1993

Civil Law Act *— Damages — Fatal accident — Loss of earnings from illegal source — Whether allowable — Civil Law Act 1956 s 8*

Civil Law Act *— Damages — Fatal accident — Loss of earnings — Whether earnings should be computed from income tax assessment — Whether all income legally earned should be allowed — Civil Law Act 1956 s 8*

Civil Law Act *— Damages — Fatal accident — Loss of future earnings for lost years — Deduction for living expenses — Civil Law Act 1956 s 8*

The appellants, as administrators of the estate of one Teoh Tek Lee, deceased, claimed loss of earnings to the estate, including loss of earnings for the lost years of the deceased who was killed in a motor accident in 1982, prior to the Civil Law (Amendment) Act 1984 coming into force. The senior assistant registrar ('the SAR') in awarding damages, declined to take account of income earned by the deceased in running a taxi which was not licensed in the name of the deceased but in the name of the father of the deceased, who had predeceased the deceased by some years. Furthermore, the SAR adopted the average monthly income of RM866.79, computed from the deceased's notice of assessment of income tax, instead of allowing the sum of RM898 per month which the SAR had accepted as the deceased's monthly income from legal sources. The appellants' appeal to the judge-in-chambers was dismissed and they appealed to the Supreme Court. The questions before the court were: (i) whether a claim in tort for loss of earnings obtained from an illegal source could be entertained by the court; and (ii) whether the SAR was correct in adopting the income computed from the notice of assessment instead of the total income earned from legal sources.

Held, dismissing the appeal in respect of illegal earnings but allowing the full income earned from legal sources:

(1) Any claim for loss of earnings from an illegal source should not be allowed on the ground that it is against public policy. Therefore, the decision of the SAR and of the judge in this case that the claim for that part of the damages as related to the illegal operation of the taxi should not be allowed, was upheld.

(2) A court should regard a figure from any notice of assessment of income tax as *res inter alios* and consider the evidence with an open mind. The income of RM898 per month as found and

assessed by the SAR was income not illegally earned and should be adopted and accepted.

(3) As the claim in this case was for loss of earnings under s 8 of the Civil Law Act 1956 and for assessment of damages for the lost years, an appropriate number of years of purchase from the death of the deceased should be adopted. The SAR had erred in awarding pre-trial and post-trial loss of earnings.

(4) The principle of assessment for the lost years is well settled. The loss to the estate is what the deceased would have been likely to have available, to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest he was reasonably likely to achieve. Therefore, out of the monthly earnings of RM898 and to account of the cost of his living, a sum of RM200 per month being the cost of food for the deceased and RM200 for the deceased's personal expenses was deducted, leaving about RM500 for him to save or spend on his family and so on. The datum of RM500 should be adopted and by using the figure of 16 as the appropriate number of years of purchase, from the annuity tables, such loss would be about RM65,000 which carried no interest.

[Bahasa Malaysia summary

Perayu, sebagai pentadbir harta pusaka Teoh Tek Lee, si mati, telah menuntut kehilangan pendapatan kepada harta pusaka, termasuk kehilangan pendapatan dalam tahun-tahun yang kehilangan akibat kematian si mati yang telah meninggal dunia dalam suatu kemalangan motor pada tahun 1982, sebelum Akta (Pindaan) Undang-Undang Sivil 1984 mula berkuatkuasa. Penolong kanan pendaftar ('PKP') apabila mengawardkan ganti rugi, enggan mengambil kira pendapatan yang diperolehi oleh si mati daripada memandu teksi yang tidak dilesenkan dalam namanya tetapi dalam nama bapa si mati yang telah meninggal dunia beberapa tahun sebelumnya. Tambahan pula, PKP telah mengambil pendapatan bulanan purata sebanyak RM866.79, dikira daripada notis taksiran cukai pendapatan si mati, dan tidak membenarkan jumlah RM898 sebulan yang telah diterima oleh PKP sebagai pendapatan bulanan si mati yang diperolehi daripada punca-punca sah. Rayuan perayu kepada hakim dalam kamar telah ditolak dan mereka telah merayu ke Mahkamah Agung. Soalan di hadapan mahkamah adalah: (i) sama ada suatu tuntutan dalam tort untuk kehilangan pendapatan daripada punca yang menyalahi undang-undang boleh dilayan oleh mahkamah; dan (ii) sama ada PKP betul apabila mengambil pendapatan yang dikira daripada notis taksiran dan bukan jumlah pendapatan yang diperolehi daripada punca-punca sah.

Diputuskan, menolak rayuan berkenaan dengan pendapatan yang menyalahi undang-undang tetapi membenarkan kesemua pendapatan yang diperolehi daripada punca-punca sah:

(1) Sebarang tuntutan untuk kehilangan pendapatan daripada punca yang menyalahi undang-undang tidak seharusnya dibenarkan atas alasan bahawa ia bertentangan dengan polisi awam. Oleh itu, keputusan PKP dan hakim dalam kes ini bahawa tuntutan untuk bahagian ganti rugi yang berkaitan dengan kegiatan memandu teksi secara menyalahi undang-undang tidak seharusnya dibenarkan, telah disahkan.

(2) Mahkamah seharusnya menganggap suatu jumlah dalam sebarang notis taksiran cukai pendapatan sebagai *res inter alios* dan mempertimbangkan keterangan dengan fikiran terbuka. Pendapatan sebanyak RM898 sebulan seperti yang didapati dan ditaksirkan oleh PKP merupakan pendapatan yang tidak diperolehi secara menyalahi undang-undang dan seharusnya diambil dan diterima.

(3) Oleh kerana tuntutan dalam kes ini adalah untuk kehilangan pendapatan di bawah s 8 Akta Undang-Undang Sivil 1956 dan untuk pentaksiran ganti rugi untuk tahun yang hilang, suatu nombor yang berpatutan untuk bilangan tahun pembelian yang dikira daripada kematian si mati patut diambil. PKP telah membuat kesilapan apabila mengawardkan kehilangan pendapatan secara praperbicaraan dan selepas perbicaraan.

(4) Prinsip taksiran untuk tahun yang hilang sudah mantap. Kehilangan kepada harta pusaka merupakan apa yang si mati itu mungkin ada, untuk disimpan, dibelanja atau dibahagikan selepas membiayai kos kehidupannya pada suatu tahap yang mungkin dapat dicapai olehnya memandangkan pekerjaan dan peluang kemajuan kerjanya pada masa kematiannya. Oleh itu, daripada pendapatan bulanan sebanyak RM898 dan untuk mengambil kira kos kehidupannya, sejumlah RM200 sebulan sebagai kos makanan si mati dan RM200 untuk perbelanjaan peribadi si mati ditolak, meninggalkan lebih kurang RM500 untuk beliau menyimpan atau membelanjakan atas keluarganya dan sebagainya. Asas RM500 seharusnya diambil dan dengan menggunakan nombor 16 sebagai bilangan tahun pembelian yang berpatutan, daripada jadual anuiti, kehilangan itu berjumlah lebih kurang RM65,000 yang tidak membawa bunga.]

Notes

For cases on claims for loss of earnings under the Civil Law Act 1956, see 1 *Mallal's Digest* (4th Ed) paras 1791–1813.

Cases referred to

1 *Yaakub Foong v Lai Mun Keong & Ors* [1986] 2 MLJ 317 (folld)
2 *Kang Bark Teng & Anor v Lee Kwee Lim & Anor* [1952] MLJ 27 (not folld)
3 *Tan Chooi Thin & Anor v Teo Whee Hong* [1953] MLJ 203 (not folld)
4 *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219 (folld)

A 5 *Burns v Edman* [1970] 2 QB 541; [1970] 1 All ER 886; [1970] 2 WLR 1005 (folld)
6 *Lebagge v Buses Ltd* (1958) NZLR 630 (folld)
7 *Dhlamini v Protea Assurance* 1974 (4) SA 906 (A) (folld)
8 *Cookson v Knowles* [1977] QB 913; [1977] 2 All ER 820; [1977] 3 WLR 279 (not folld)
B 9 *Gammell v Wilson* [1982] AC 27; [1981] 1 All ER 578; [1981] 2 WLR 248 (folld)
10 *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 (refd)

Legislation referred to

C Road Traffic Ordinance 1958 s 126

Gurbachan Singh (*Bachan & Kartar*) for the appellants.
Al-Baishah bte Haji Abdul Manan (Senior Federal Counsel) for the respondents.

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Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): The main question that confronts this court squarely is whether a claim in tort for loss of earnings obtained from an illegal source can be entertained by a court as E there appears to be a conflict on the point in decisions of the High Court. There are other minor issues also in this case. A summary of material facts and issues is set out below.

Administrators of the estate of one Teoh Tek Lee, deceased (hereafter 'the deceased'), claimed loss to the estate including loss of earnings for the lost years of the deceased who was killed in a motor accident in respect of F which the action was filed. Liability was conceded by the defendants and the assessment of damages was heard before the learned registrar who found, after taxing down rather drastically earnings figures stated in evidence, and accepted that the deceased had three sources of income, the first of which was Yew Lee Estate from which the deceased earned RM518 per G month, the second, Yew Lee Seng Kee (M) Sdn Bhd, from which he earned RM325 per month, and the third, a firm called Taiping Amusement, from which he earned RM55 per month. The learned registrar declined, however, to take account of income earned by the deceased in running a taxi which was not licensed in the name of the deceased, but in the name of the father of the deceased, the said father having predeceased the deceased H some years previously. She further referred to the relevant notice of assessment of income tax payable by the deceased and issued by the Director General of Inland Revenue to the deceased when alive, in which the deceased's taxable income was stated therein as RM10,176 for the whole year and learned registrar averaged it to RM866.79 per month which I she adopted as the basic loss of earnings per mensum, thus ignoring, to all intents and purposes, the earnings from these sources which she specifically found. She then used this figure of RM866.79 in assessing 'pre-trial' loss for the period of eight years and seven months at RM866.79 per month

with usual interest of 8%pa and 'post-trial' loss of earnings of nine years and five months at RM866.79 per month. The two periods of eight years and seven months and nine years and five months total 18 years which the learned registrar stated to the effect was the number of years of purchase awarded for loss of future earnings for the deceased, a way of assessment of damages which is clearly erroneous.

For special damages, she awarded RM4,500 for funeral expenses; RM400 for cost of letters of administration and RM6,500 for loss of expectation of life. The learned registrar did not write grounds of decision and in her brief findings and order, she recorded at the end of the notes of evidence that she made no allowance for the sum of RM1,500 per month as the sum which the deceased earned from the taxi. It was strenuously argued earlier by learned counsel for the defendants on ground of illegality that such sum should be excluded from damages to be awarded. The learned registrar apparently accepted such a submission.

The administrators of the estate of the deceased, not being satisfied with the damages thus awarded, appealed to the judge-in-chambers from the decision of the learned registrar only on two questions, viz, first, the learned registrar should not have refused to take into account the earnings from the taxi licensed in the name of the father of the deceased and secondly, the learned registrar should not have adopted the average monthly income computed from the notice of assessment of income tax for the relevant year, in other words, by disregarding the income of the deceased from the three other sources as found by her. The learned judge dismissed the appeal with costs and confirmed the whole of the order of the learned registrar.

The licence for the taxi in question was issued to the name of the father of the deceased in 1976 and was expressed to be valid until 1983, when it would then expire. The said father died in 1977 and thereafter, the taxi continued to be operated by the deceased purportedly without ever having himself applied, in his lifetime, to the Road Transport Licensing Board ('the Licensing Board') for a transfer of the licence to his own name or to the name of the administrator of the estate of the said father.

From the evidence, it appeared that some of the officers of the Road Transport Department ('the said Department') were aware of the death of the said father and the continued operation of the taxi by the deceased without ever prosecuting the deceased in respect of it.

Under the previous Road Traffic Ordinance 1958 ('the said Ordinance') (since repealed and replaced by the Road Transport Act 1987), in respect of a licence of a taxi as applicable to the deceased, s 126 thus provided:

> (1) Subject to the provisions of subsection (3) of this section, a licence granted under this Part of this Ordinance shall be personal to the holder thereof, and shall not be transferred or assigned. Except with the previous consent of the Licensing Board the holder of such licence may not appoint an agent or an attorney for the purpose of exercising any of the rights conferred on the licence holder. The holder of such licence shall not cause or permit any such agent or attorney to exercise any such rights.
>
> (2) Any holder of a licence granted under this Part of this Ordinance who purports to transfer or assign the licence, or causes or permits any other person to use an authorised vehicle or to provide the service authorised in

the licence, shall be guilty of an offence and liable to conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand five hundred dollars or to both such imprisonment and fine.

(3) The Licensing Board may in the event of the death, incapacity, bankruptcy or, in the case of a company, liquidation of the holder of such licence, or where a receiver or manager is appointed in relation to the business of the holder of such licence, or where for any reason the Licensing Board is satisfied that it would be unjust not to do so authorise the transfer of such licence.

It is to be borne in mind that the Licensing Board under the said Ordinance was separate and independent from the civil servants that staffed the said Department engaged in overseeing, inter alia, the compliance by the public of the provisions of the said Ordinance, while members of the Licensing Board were appointed by the Minister of Transport usually from members of the public for granting, revocation or suspension of public service vehicle licences such as the licence for a taxi. The fact that officers of the said Department did not initiate any prosecution for any offence in respect of the use of the taxi licence could not legally amount to any such previous consent of the Licensing Board to the continued use of the taxi by the deceased as stated in s 126 above.

Such user of the taxi licence by the deceased could undoubtedly be an offence under s 126 of the said Ordinance notwithstanding the extenuating circumstances accompanying such user which could have mitigated greatly the punishment of the deceased had he been prosecuted. The continued use of the taxi licence by the deceased was undoubtedly also illegal, and the income earned from such illegal activity was therefore illegally obtained. It was not disputed by the parties herein that such income had amounted to about RM1,500 per month.

The learned judge in the High Court had three decisions cited to him, viz *Yaakub Foong v Lai Mun Keong & Ors*;[1] *Kang Bark Teng & Anor v Lee Kwee Lim & Anor*;[2] *Tan Chooi Thin & Anor v Teo Whee Hong*[3] and in the event that has turned out, the learned judge followed *Yaakub*[1] but declined to follow the other two, upholding the decision of the learned registrar in not taking account of the earnings that came from the operation of the taxi.

On this question, we briefly review the three cited cases. The first case is *Kang Bark Teng*,[2] decided in 1950. The deceased, Kang, while travelling in a lorry, was killed in a collision between the lorry and a motorcar. The administrators of estate of Kang sued both drivers for negligence for the benefit of the dependants comprising the widow, son and the mother of the deceased. The deceased was an unlicensed hawker of pork for some years. All defendants there did not raise any objection to the evidence of such income from the business of unlicensed hawking. The learned judge took into account such income of the deceased but apparently gave effect to some shortening of the period of continuance of such support to the dependants because, according to the learned judge being an unlicensed hawker, the deceased was liable to eviction from the place where his stall was, and also to confiscation of goods and prosecution. The learned judge awarded a comparatively small sum of RM5,000 as loss of support to the dependants, and though nothing was said as to how the learned judge came

to this figure, there was no doubt the aforesaid shortening of period had figured in the assessment.

In *Tan Chooi Thin*,[3] decided in 1937, the learned judge there had to consider the allegation that the deceased, who was also killed in a motor accident, had derived some income from smuggling of some precious stones contrary to customs legislation. The learned judge then said, obiter, that if there was reliable evidence of profit from this, he would include such income for assessing the deceased's earnings there. His reasoning for allowing such income, if there was sufficient evidence for it, was, inter alia, to draw an analogy from an action by an unlicensed driver against another driver for negligence. Such unlicensed driver would not be barred from such action for damages.

In *Yaakub*,[1] decided in 1986, the plaintiff was a Malaysian working in Singapore. In assessing the plaintiff's earnings in Singapore, while considering the plaintiff's admission that no income tax was paid by him to the Singapore tax authority and that some extra work he did was in contravention of his work permit issued by the Singapore Government, the learned judge observed, also obiter, to the effect that, if there had been cogent evidence of the precise amount of income tax which would have been payable by the plaintiff, and the amount which he illegally earned in contravening his work permit, he would have made the necessary deductions. The learned judge appears to have clearly dissented from the decisions in *Kang*[1] and *Tan*[3] on the point in question.

We have had however the benefit of reading the judgment of the learned Chief Justice of Singapore in the High Court, Singapore in *Ooi Han Sun v Bee Hua Meng*,[4] in which not only the three cases cited above, but some other cases in other common law jurisdictions were also reviewed. The learned Chief Justice held to the effect that in a claim by a Malaysian plaintiff in an action for negligence for loss of earnings obtained by working in Singapore without a work permit from the Singapore authority, it would be against public policy for the court to entertain a claim for such loss of earnings in Singapore but the Malaysian plaintiff was instead awarded damages based on an estimate of what he would have earned in Malaysia.

The High Court in Singapore also reviewed, before coming to its aforesaid decision, *Burns v Edman*[5] in which Crichton J, in a case in which the widow of a man killed in an accident had claimed damages for loss of dependency, held that since the earnings came from proceeds of crime committed by the deceased husband, she could not succeed in claiming such damages, even as a dependant and that *ex turpi causa non oritur actio* applied. Then yet another case was reviewed; that came from the Court of Appeal of New Zealand in *Lebagge v Buses Ltd.*[6] In that case, the deceased was killed also in a motor accident, and the administrator claimed damages on the basis of his operation of a truck to fulfil his milk contract seven days a week. The defendant, in opposing the claim there, apparently submitted that the basis should be six days a week and not seven days because the Transport Licensing Regulations 1950 of New Zealand prohibited anybody driving such a truck without having at least 24 consecutive hours of rest in any given seven days. The court then held that the action filed by the widow was

free from and unaffected by illegality, with reference to the milk contract, and the claim was allowed on the basis of seven days though it was proper to take into consideration the possibility that the regulations might be enforced against the deceased with the deceased's income thereby diminished, a reasoning in similar vein to that in *Kang*.[2]

The learned Chief Justice of Singapore also reviewed a case in the South African Court of Appeal of five judges in *Dhlamini v Protea Assurance*[7] in which it is said to have been held that the plaintiff, an unlicensed hawker for 20 years, had her claim for damages based on the loss of earnings from unlicensed hawking disallowed on the ground of such claims being against public policy.

We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun*;[4] *Burns*;[5] *Lebagge*[6] and *Dhlamini*[7] and approve the dictum in question in *Yaakub*.[1] We therefore uphold the decision of the learned judge in the court below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed; because *ex turpi causa non oritur actio* or, in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi*,[4] that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law, such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand, and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present time.

We have realized, of course, that in any case when the claim for dependency is solely based on income earned from an illegal activity, the dependants, though completely innocent of the illegality, will suffer an injustice and the tortfeasor, will obtain an undeserving windfall. The dependants' interests are thus seen to be irreconcilable with the interests of the law; the latter are, to provide certainty of the law but yet give rise to an injustice in such a situation.

The interests of the law are beyond providing merely certainty of the law. They are also to protect society from illegal activities which, if allowed to pass without judicial castigation, would encourage such illegal activities,

and allow the perpetrators to set an example to fellow citizens to regard such illegal activities with tolerance and a desire to follow the same. The insidious consequences are not hard to imagine. With religion losing its grip on significant numbers of society, the interests of law in this sense would have to be rigorously upheld. We therefore are of the opinion that such personal interests of such dependants or other claimants would have to be sacrificed for the greater interests of the law.

We now deal with the complaint that the learned registrar was wrong in confining herself to the Inland Revenue's notice of assessment of income tax and to pay the same as served on the deceased, in arriving at the monthly figure of RM866.79, being the average monthly figure of the total assessable income of RM10,401.50 for the relevant year. We set out below parts of the relevant findings of the learned registrar which she wrote at the end of the evidence:

> Si mati ada tiga sumber pendapatan. Yew Lee Estate: RM6,176.50 setahun atau RM518 sebulan. Yew Lee Seng Kee (M) Sdn Bhd: RM4,225 setahun atau RM325 sebulan. Syarikat Taiping Amusement: RM660 setahun atau RM55 sebulan. Sumber pendapatan teksi tidak dikira 'personal to holder'. Mengikut 'income tax assessment' ia menerima RM10,401.50 setahun atau RM886.79 sebulan.
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> Pre-trial loss:
> From 23 May 1982 to 23 December 1990 — 8 years and 7 months
> RM866.79 x 8 years 7 months
> Interest at 8%pa.
>
> Loss of future earnings:
> No of years' purchase — 18 years (Retirement age – 60)
>
> Post-trial loss:
> 23 May 1982 to 23 December 1990 — 9 years 5 months
> RM866.79 x 9 years 5 months
> No interest.

It is pertinent to point out that the fatal accident took place in 1982 and therefore the Civil Law (Amendment) Act 1984 which came into effect on 1 October 1984 does not apply to this case.

After cutting down considerably the amount of the claim of the plaintiffs for the loss of income from the legal sources as appears from the evidence, the learned registrar specifically found, by the clearest implication from her notes set out above, that the deceased had earned a total sum of RM898 from these three legal sources, a sum for which there is no good reason for the court to interfere with, though it represents a small portion of the amount of RM5,000 (excluding the hefty sum earned from the taxi) as claimed by the plaintiffs in evidence. The learned registrar could have cut down the amounts so much on account of finding exaggeration in the relevant evidence. One would not therefore expect her to reduce it further. She then referred to the average monthly figure of the taxable income from the Inland Revenue's bill to the deceased taxpayer, and adopted this average monthly figure of RM866.79. The inference seems to be that she felt bound to accept this figure from the Inland Revenue's source. The difference

between RM898 and RM866.79 is small but a question of principle thus arises. Is a court bound by such a similar figure?

We do not think that any court is bound by such a figure; it is relevant for cross-examination and for consideration by the court as to any probability of any income figure claimed by a plaintiff in evidence. The jocular and popular expression of the 'national pastime' of (legitimate) avoidance of income tax liability comes to mind in the sense of getting income exempted from income tax thereon under various provisions of income tax legislation. Further, a court has to act on evidence adduced before it, and to give any due weight, if any, to it. A court should regard such similar figure from any similar notice of assessment as *res inter alios* and consider the evidence with an open mind.

In the instant case, the income as found and assessed by the learned registrar was income not illegally earned, it should be adopted and accepted by her.

We now deal with another matter. The claim by the plaintiff in this case, by pleadings, was based on loss of dependency under s 7 of the Civil Law Act 1956 ('the Act') and loss to the estate of the deceased under s 8 of the Act. At the hearing however, learned counsel informed the learned registrar (at p 99 of the appeal record) that the plaintiff's claim was based on a claim for loss of earnings and not for loss of support or dependency, in other words, a claim for lost years by the estate, viz under s 8 of the Act. On being questioned at the hearing before us, learned counsel confirmed the same.

If the claim was for loss of earnings for lost years, then the learned registrar has clearly erred in awarding pre-trial and post-trial loss of earnings respectively for two periods totalling 18 years which she described as the number of years of purchase. She should have departed from such practice as recommended in *Cookson v Knowles*[8] for such claims by a living plaintiff for loss of earnings or a dependent of a deceased bread-winner for loss of support by dividing the award into two parts, viz pre-trial loss and future loss from the date of the trial. Instead, she should have adopted the practice of *Gammell v Wilson*[9] for assessment of damages for such loss of earnings for lost years by adopting a figure as an appropriate number of years' purchase from the date of death of the deceased plaintiff. The awards herein of pre-trial and post-trial losses cannot stand. This court will not assess such loss of earnings.

The principle of such assessment is well settled. The loss of the estate is what the deceased would have been likely to have available, to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest he was reasonably likely to achieve — per Lord Scarman in *Gammell*[9] at p 266.

However, the assessment in this case presents unusual difficulties but the task remains of arriving at a fair figure to compensate the estate. The difficulties arise from the exclusion from assessment of damages of the sum of RM1,500 per month, the undisputed monthly earnings from the taxi, which was a hefty contribution to the deceased's income as well as a fruitful source of money from which the deceased spent on personal and family expenses. Thus, according to the evidence, the deceased's personal expenses

must have come partly from the earnings of the taxi, which came to between RM1,000 to RM1,500 per mensem, apart from his food expenses at home. Therefore, the stated amount of personal expenses which would otherwise be relevant for assessing the cost of the deceased's living has been distorted by the court's exclusion of earnings of the taxi. The task of arriving at such an fair figure would thus be approaching that sort of pure speculation that faced the Federal Court in *Yang Salbiah v Jamil bin Harun*[10] in which the Federal Court was faced with the task in a case of total incapacity involving a child (of seven years old at the time of accident) of having to assess the loss of future earnings by way of speculation as to the amount of income she would have earned for herself at an appropriate age.

Therefore, out of the monthly earnings of RM898 and to account of the cost of his living, we assess that a sum of RM200 per month being the cost of food for the deceased and another appropriate sum of RM200 for the deceased's personal expenses could be deducted, leaving about RM500 for him to save, or if he liked, for spending on his family and so on. The datum of RM500 should be adopted, by using the figure of 16 as the appropriate number of years of purchase to arrive at the figure for loss of earnings for the lost years, and from the annuity tables, such loss would be about RM65,000 which shall carry no interest.

The order of the learned registrar made on 3 January 1991 and upheld by the learned judge in the High Court is therefore set aside and is substituted therefor, the order dated back to 3 January 1991, as follows:

(1) Loss of expectation of life	RM 6,500
(2) Funeral expenses	RM 4,500
(3) Cost of applying for letters of administration	RM 400
(4) Loss of future earnings	RM65,000

All sums above shall carry interest at the usual rates of 4%pa and 8%pa except for the loss of future earnings which shall carry no interest.

On the question of costs, the plaintiffs have succeeded in part, but they in fact recover less than what was awarded to them by the learned registrar earlier. We therefore make no order as to costs here but the costs in the court below remains payable by the defendants and are to be paid to the plaintiffs by the defendants after taxation.

Order accordingly.

Reported by Prof Ahmad Ibrahim